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CHRISTOPHER BANDI v. TUMBUNG NAKIS & ANOR; JAMIL SINDI (THIRD PARTY)

COURT OF APPEAL, PUTRAJAYA
ABDUL AZIZ ABDUL RAHIM JCA
DAVID WONG DAK WAH JCA
B ABDUL RAHMAN SEBLI JCA
[CIVIL APPEAL NO: Q-04(IM)-302-11-2015]
21 MARCH 2016

C ***CIVIL PROCEDURE:*** *Amendment – Writ and statement of claim – Application to include additional claim – Whether application could be made at any stage of proceedings – Decision of sessions court to dismiss application – Whether appealable – Courts of Judicature Act 1964, s. 3 – Whether fell under definition of 'decision'*

The appellant and the respondents were involved in an accident in which the
D appellant sued the respondents in the Sessions Court for general and special damages for tort. Before the commencement of the continuation of trial, the appellant filed an application to amend the writ and statement of claim to include additional claims for cost of professional care ('application for amendment'). The Sessions Court Judge ('the SCJ') dismissed the application for amendment, resulting in an appeal to the High Court. At the High Court,
E the respondents and the third party raised a preliminary objection premised on the contention that the decision of the SCJ was not within the definition of s. 3 of the Courts of Judicature Act 1964 ('the CJA') and hence, non-appealable. The Judicial Commissioner sustained the preliminary objection. Hence, the present appeal. The appellant submitted that an
F application to amend pleadings was not caught under s. 3 of the CJA as the Rules of Court 2012 allows for such application to be made at any stage of the proceedings including after trial and before handing down of the decision.

Held (dismissing appeal with costs)
Per David Wong Dak Wah JCA delivering the judgment of the court:

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(1) A decision on an application to amend the writ of summons and statement of claim is a decision made during the course of the trial which does not finally dispose of the rights of the parties and therefore, is not a decision within the meaning of s. 3 of the CJA. (para 15)

H **(2)** To concede to the contention that the appeal was appealable would give a party an extra bullet to delay an expeditious trial and would also be inconsistent to the jurisprudence of the present regime of civil procedure. Parties must be aware that they have a duty to frame their case fully in all their causes of action and defences prior to the start of
I the trial. Conducting one's case by instalment must not be allowed in the context of the present regime of civil procedure. (para 19)

(3) The appellant can still litigate the refusal of the SCJ in allowing the application for amendment in the appellate court if there is an appeal by the appellant after the conclusion of the trial of the suit. Hence, the appellant still reserves the right to challenge this refusal of the SCJ to allow the requested amendment. (para 21)

Bahasa Malaysia *Headnotes*

Perayu dan responden-responden terlibat dalam satu kemalangan yang menyebabkan perayu menyaman responden-responden di Mahkamah Sesyen bagi ganti rugi am dan khas di bawah tort. Sebelum tarikh bermulanya sambung bicara, perayu memfailkan permohonan meminda writ dan pernyataan tuntutan untuk memasukkan tuntutan tambahan bagi kos jagaan profesional ('permohonan untuk meminda'). Hakim Mahkamah Sesyen ('HMS') menolak permohonan untuk meminda, dan ini mengakibatkan rayuan di Mahkamah Tinggi. Di Mahkamah Tinggi, responden-responden dan pihak ketiga membangkitkan bantahan awal atas alasan bahawa keputusan HMS tidak dinyatakan dalam definisi s. 3 Akta Mahkamah Kehakiman 1964 ('AMK') dan dengan itu, tidak boleh dirayu. Pesuruhjaya Kehakiman membenarkan bantahan awal tersebut. Oleh itu, rayuan ini. Perayu menghujahkan bahawa permohonan untuk meminda pliding tidak terkandung dalam s. 3 AMK kerana Kaedah-Kaedah Mahkamah 2012 membenarkan permohonan sedemikian dibuat pada mana-mana peringkat prosiding termasuk selepas perbicaraan dan sebelum keputusan dibuat.

Diputuskan (menolak rayuan dengan kos)
Oleh David Wong Dak Wah HMR menyampaikan penghakiman mahkamah:

(1) Keputusan mengenai permohonan meminda writ saman dan pernyataan tuntutan adalah keputusan yang dibuat semasa perbicaraan berjalan dan tidak menentukan hak pihak-pihak dan dengan itu, bukan satu keputusan dalam maksud s. 3 AMK.

(2) Untuk memperakui dakwaan bahawa rayuan tersebut boleh dirayu akan memberi satu pihak peluru tambahan untuk melengahkan perbicaraan yang cepat dan akan bercanggah dengan jurisprudens rejim tatacara sivil. Pihak-pihak mestilah sedar bahawa mereka berkewajipan merangka penuh kes mereka iaitu berkenaan kausa-kausa tindakan dan pembelaan-pembelaan sebelum bermulanya perbicaraan. Menjalankan satu-satu kes secara ansuran tidak boleh dibenarkan dalam konteks rejim tatacara sivil kini.

(3) Perayu masih boleh melitigasi keengganan HMS untuk membenarkan permohonan untuk meminda di mahkamah rayuan jika terdapat rayuan oleh perayu selepas tamatnya perbicaraan guaman tersebut. Oleh itu, perayu masih berhak mencabar keengganan HMS untuk membenarkan pindaan yang dipohon.

Case(s) referred to:

AON Risk Services Australia Ltd v. Australian National University [2009] 258 ALR 14 ***(refd)***

Datuk Seri Tiong King Sing v. Datuk Seri Ong Tee Keat & Anor [2014] 1 LNS 1073 CA ***(refd)***

Hong Leong Finance Bhd v. Low Thiam Hoe & Another Appeal [2015] 8 CLJ 1 FC ***(refd)***

HSBC Bank Malaysia Bhd v. Macquarie Technologies (Malaysia) Sdn Bhd & Another Appeal [2004] 3 CLJ 121 CA ***(refd)***

Jr Lincks College Of Higher Education v. Majlis Perbandaran Melaka [2008] 3 CLJ 808 CA ***(refd)***

Raphael Pura v. Insas Bhd & Anor [2000] 4 CLJ 830 CA ***(refd)***

Raphael Pura v. Insas Bhd & Ors [2003] 1 CLJ 61 FC ***(refd)***

Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 FC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 3

For the appellant - Sarbjit Singh Khaira (Joseph Kahell Baleng); M/s Khaira & Co Advocates & Solicitors

For the 1st & 2nd respondents - Allan Lao Puong Toong (Shally Heng Wek Yee with him); M/s David Allan Sagah & Teng Advocates

For the 3rd party - Liew Tang Chieh (Robert Jawan Wellington with him); M/s Tang & Partners Advocates

[Editor's note: For the Court of Appeal judgment, please see Christopher Bandi v. Tumbung Nakis & Anor; Jamil Sindi (Third Party) [2015] 1 LNS 784 (affirmed).]

Reported by Najib Tamby

JUDGMENT

David Wong Dak Wah JCA:

[1] This is an appeal against the decision of the learned Judicial Commissioner in dismissing an appeal which arose from the decision of the learned Sessions Court Judge premised on a preliminary objection by the respondents and the third party that the matter before him was non-appealable. The Sessions Court Judge had dismissed the appellant's notice of application for leave to amend the statement of claim with costs of RM500.

[2] We heard the appeal on 11 March 2016 and reserved judgment to give due consideration to the submissions of the respective counsels. We have since done so and now give our decision together with our grounds.

Background Facts

[3] The appellant and the respondents were involved in an accident in which the appellant sued the respondents in the Sessions Court claiming for general and special damages for tort allegedly committed in a road accident.

[4] The trial of the aforesaid suit had commenced on 9 October 2014 and one witness had given evidence. The trial was not completed in one continuous session and subsequent dates were given by the trial judge for continuation of the trial. Before the date of commencement of the continuation of trial, the appellant filed a formal application to amend the writ and the statement of claim dated 6 June 2013 to include additional claim for 'cost of professional care'.

[5] The learned Sessions Court Judge dismissed the application for amendment resulting in an appeal to the High Court. At the High Court the respondents and the third party raised a preliminary objection premised on the contention that the aforesaid decision of the learned Sessions Court Judge is not a decision within the definition of s. 3 of the Courts of Judicature Act 1964 (CJA) and hence non-appealable.

[6] The learned High Court Judge sustained the preliminary objection and his reason is as follows:

> In the present case, it is obvious that the learned SCJ's decision was made in the course of a trial or hearing which does not have the effect of finally disposing the rights of the parties. As such this decision does not constitute a "decision" for the purpose of section 3 of CJA and would render it to be non-appealable.

Our Grounds Of Decision

[7] Learned counsel for the appellant submitted that an application to amend pleadings is not caught under s. 3 of the CJA as the Rules of Court 2012 allows for such application to be made at any stage of the proceedings including after trial and before the handing down of the decision. He also referred to numerous cases which had gone right up to the apex courts of the country which had dealt with applications of pleadings.

[8] The cases are referred to as follows:

(a) Court of Appeal's case: *Raphael Pura v. Insas Bhd & Anor* [2000] 4 CLJ 830 - an appeal from the decision of the High Court dismissing the appellant's application to amend his statement of claim.

(b) Federal Court's case: *Raphael Pura v. Insas Bhd & Ors* [2003] 1 CLJ 61 - an appeal from the decision of the High Court dismissing the appellant's application to amend his statement of claim.

(c) Court of Appeal's case: *HSBC Bank Malaysia Bhd v. Macquarie Technologies (Malaysia) Sdn Bhd & Another Appeal* [2004] 3 CLJ 121 - an appeal from the decision of the learned High Court Judge dismissing an application to amend the defence.

(d) Court of Appeal's case of *Jr Lincks College Of Higher Education v. Majlis Perbandaran Melaka* [2008] 3 CLJ 808 - an appeal by the appellant/ plaintiff against the High Court's refusal to grant its application for leave to amend the name of the plaintiff in the writ of summons and statement of claim.

[9] There is no doubt that applications to amend pleadings have been litigated right up to our apex courts. Be that as it may, from our reading of the cases, the issue whether such rulings are appealable in the context of s. 3 of the CJA was not considered at all. From our research, this very issue has not been adjudicated in our appellate courts.

[10] As for the contention that amendments to pleadings can be done at any stage of proceedings, we cannot ignore the fact that the application in this matter was made during the course of the trial. It is in that context our decision is premised on.

[11] As s. 3 of the CJA is the focal point of this appeal, it would be appropriate that we produce the same:

> "decision" means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.

[12] Section 3 of the CJA was the subject of deliberation in the recent case of *Datuk Seri Tiong King Sing v. Datuk Seri Ong Tee Keat & Anor* [2014] 1 LNS 1073 where the Court of Appeal was confronted with the same issue except for the fact that the application was made during the course of trial to compel a witness to disclose the identities of his 'sources' referred to in a newspaper article written by him in the Sunday Times. The appellant took out a formal application by way of encl. 35 to compel the disclosure. The learned judge refused the application, thus an appeal was lodged to this court.

[13] During the submissions of the case of *Datuk Seri Tiong King Sing (supra)*, the question of whether the decision of the learned judge in dismissing encl. 35, which was made during the course of the trial, was appealable was raised. This court through the judgment of Azahar Mohamed JCA (as he then was) held as follows:

> [8] Learned counsel for the plaintiff argued that the present appeal concerned an order dated 31.7.2013 made on a substantive application brought by way of enclosure 35 filed by the plaintiff against Joseph Sipalan to compel disclosure. Learned counsel submitted that the appeal was not against a ruling made in the course of the trial considering that when the learned High Court judge decided that Joseph Sipalan need not disclose "his sources", Her Ladyship made an order on a substantive application for which the plaintiff, a dissatisfied party, could appeal to the Court of Appeal within the meaning of section 67(1) of the Courts of Judicature Act 1964 ("CJA").

[9] With respect, we do not agree with this submission. In our judgment, the decision of the learned High Court judge handed down on 31.7.2013 now forming the subject matter of the present appeal, was in effect and in substance a ruling made in the course of the trial, and not an order or a judgment as stated in section 67(1) of the CJA which reads:

> The Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to this or any other written law regulating the terms and conditions upon which such appeals shall be brought.

[10] It is true that in the present case, the plaintiff caused to be filed a formal application (enclosure 35) to require Joseph Sipalan to disclose the identity of the 'sources' and that this application was supported by an affidavit and replied through affidavit as well. Joseph Sipalan is no longer a party to the plaintiff's defamatory action. He was merely a witness. An important point which must not be overlooked is that enclosure 35 was filed and then determined by the learned High Court judge during the course of the trial, even as Joseph Sipalan was in the midst of giving his testimony. Viewed in this way, the fact that a formal application was filed should not make any difference to the matter at hand. What is of greater significance is at what juncture the said ruling was made?

We agree with the submissions of learned counsel for Joseph Sipalan and the 4th defendant that in substance what was sought was a ruling by the learned High Court judge in the course of the trial as to whether Joseph Sipalan should be compelled to disclose the identity of the 'sources'.

[11] Now, section 67 of the CJA provides that civil appeals may be lodged against a "judgment" or "order" of the High Court. The terms "judgment" or "order" are not defined in the CJA but they are collectively referred to as "decision" as can be seen in section 3 of the CJA which states:

> 'Decision' means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.

[12] More significant still is that section 3 of the CJA qualifies a "decision" so that it "does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of parties". That is why, in our judgment the decision of the learned High Court judge that Joseph Sipalan need not disclose 'his sources' was in fact a ruling made in the course of a trial, which did not finally dispose of the rights of the plaintiff. By reason thereof, it is not an order or a judgment as stated in section 67(1) of the CJA.

[14] The aforesaid decision was upheld by the Federal Court on 7 March 2016. Needless to say, applying the principle of *stare decisis* and if we find that the facts in that case are on all fours with our present case, we are duty bound to adopt the rationale expounded therein.

[15] In our considered view, there is no doubt that a decision on an application to amend the writ of summons and statement of claim, as it is here, is a decision made during the course of the trial which does not finally dispose of the rights of the parties, and therefore is not a decision within the meaning of s. 3 of the CJA. The two ingredients of s. 3 of the CJA had been complied with and hence we find that the factual matrix here is on all fours with *Datuk Seri Tiong King Sing* case *(supra)*.

[16] In our deliberation, we also find the recent decision of the *Hong Leong Finance Bhd v. Low Thiam Hoe & Another Appeal* [2015] 8 CLJ 1 to be of some significance and valuable guidance. In that case, it also concerned an application to amend pleadings and the principle of the often quoted case of *Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors* [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 was discussed. The defendant there had applied for an amendment of his defence which was dismissed by the High Court Judge. However, on appeal to this court, the application for amendment was allowed. On appeal to the Federal Court, the decision of the High Court Judge in dismissing the application to amend the defence was reinstated. To recapitulate, the principle of *Yamaha Motor* case, *supra*, in brief is simply this and that is as long as the amendment of the pleadings is *bona fide* and does not prejudice the opposing party, the application ought to be granted as the opposing party can be compensated with costs.

[17] The importance and great significance of the *Hong Leong Finance* case, *(supra)*, is the jurisprudence which the Federal Court expounded in allowing the appeal. They recognise the fact that we have, of late, a new framework for civil procedure and we can do no better than quote what the learned Chief Judge of Malaya said:

> [18] It is pertinent to note that *Yamaha Motor* was decided under the old RHC 1980. The civil procedure has since then changed with the introduction of the pre-trial case management in the year 2000 under O. 34 of the RHC 1980 (w.e.f. 22 September 2000) and now under O. 34 of the ROC 2012 (w.e.f. 1 August 2012). Nowadays the court recognises especially under the new case management regime that a different approach needs to be taken to prevent delay in the progress of a case to trial and for its completion. The progress of the case is no longer left in the hands of the litigants but with the court in the driver's seat. (See the case of *Syed Omar Syed Mohamed v. Perbadanan Nasional Bhd* [2012] 9 CLJ 557). In particular, when an application to amend the pleading is made at a very late stage as was done in the present case, the principles in *Yamaha Motor* ought not to be the sole consideration. This is because an order for compensation by payment of costs in such a case may not be an adequate

remedy and it would also disrupt the administration of justice which affects the courts, the parties and the other users of the judicial process. (See the case of *Conlay Construction Sdn Bhd v. Perembun (M) Sdn Bhd* [2013] 9 CLJ 828; [2014] 1 MLJ 80).

[18] The learned Chief Judge of Malaya had also relied on the view of the High Court of Australia (apex court of Australia) on how civil procedure of the courts should be now. Heydon J in *AON Risk Services Australia Ltd v. Australian National University* [2009] 258 ALR 14 had this to say:

[111] An application for leave to amend a pleading should not be approached on the basis that a party is entitled to raise an arguable claim, subject to payment of costs by way of compensation. There is no such entitlement. All matters relevant to the exercise of the power to permit amendment should be weighed. The fact of substantial delay and wasted costs, the concerns of case management, will assume importance on an application for leave to amend.

[112] A party has the right to bring proceedings. Parties have choices as to what claims are to be made and how they are to be framed. But limits will be placed upon their ability to effect changes to their pleadings, particularly if litigation is advanced. That is why, in seeking the just resolution of the dispute, reference is made to parties having a sufficient opportunity to identify the issues they seek to litigate

[113] **In the past it has been left largely to the parties to prepare for trial and to seek the court's assistance as required**. Those times are long gone. The allocation of power, between litigants and the courts arises from tradition and from principles and policy. It is recognised by the courts that the resolution of disputes serves the public as a whole, not merely the parties to the proceedings.

[114] Rule 21 of the Court Procedures Rules recognises the purposes of case management by the courts. It recognises that delay and costs are undesirable and that delay has deleterious effects, not only upon the party to the proceedings in question, but to other litigants. The Rule's objectives, as to the timely disposal of cases and the limitation of cost, were to be applied in considering ANU's application for amendment. It was significant that the effect of its delay in applying would be that a trial was lost and litigation substantially recommenced. It would impact upon other litigants seeking a resolution of their cases. What was a 'just resolution' of ANU's claim required serious consideration of these matters, and not merely whether it had an arguable claim to put forward A just resolution of its claim necessarily had to have regard to the position of AON in defending it. An assumption that costs will always be a sufficient compensation for the prejudice caused by amendment is not reflected in r. 21. Critically, the matters relevant to a just resolution of ANU's claim required ANU to provide some explanation for its delay in seeking the amendment if the discretion under r. 502(1) was to be exercised in its favour and to the disadvantage of AON. None was provided. (emphasis added)

[19] Reverting to the matter before us, to concede to the contention that the appeal before us is appealable, in our view, would no doubt give a party an extra bullet, so to speak, to delay an expeditious trial and would also be inconsistent to the jurisprudence of the present regime of civil procedure. As pointed out by the learned Chief Judge of Malaya, the Rules of Court 2012 now provides robust pre-trial case management by the courts before the trial is set down. The philosophy behind the new regime of civil procedure is simply to attend a "just, expeditious and economical" disposal of an action. Litigants through their respective counsel must understand that they must put their house in order before a case goes to trial and once the trial commenced courts will not tolerate any delay except in the most exceptional circumstance. Putting one's house in order simply means that parties and their counsel must be aware that they have a duty to frame their case fully in all their causes of action and defences prior to the start of trial. Conducting one's case by instalment must not be allowed in the context of the present regime of civil procedure. It is an undeniable fact that many cases had been stayed pending appeals to higher court on matters similar to the factual matrix in this case, which undoubtedly had delayed the disposal of these cases.

[20] The present case is a glaring example of unnecessary delay. The summons and statement of claim of the appellant were filed on 6 June 2013, the trial started on 9 October 2014 and in between then and now (March 2016) there was the appeal in the High Court and the appeal to this court. This sort of delay must be avoided at all costs. Gone also are the days when the interests of the litigants of a case are the main consideration. The interests of other litigants who are waiting for their days in court must also be considered in the present regime of civil procedure in this country.

[21] Finally, we wish to reiterate that the appellant can still litigate the refusal of the Sessions Court Judge in allowing the application for amendment of the writ and statement of claim in the appellate court if there is an appeal by the appellant after the conclusion of the trial of the suit. Hence the appellant still reserves this right to challenge this refusal of the Sessions Court to allow the requested amendment.

Conclusion

[22] This is an appeal where we find that the factual matrix is similar to that of the case of *Datuk Seri Tiong King Sing (supra)* and hence is bound by the decision of the Federal Court. Not only that, we also agree with the rationale expounded by this court in the case of *Datuk Seri Tiong King Sing (supra)*.

[23] Accordingly, we dismiss this appeal with costs in the sum of RM2,000 to both the respondents and RM1,000 to the third party. We order that the deposit be refunded.